WASHINGTON
LEGISLATIVE OFFICE

July 17, 2006

The Honorable Peter Hoekstra, Chairman
The Honorable Jane Harman, Ranking Member
House Permanent Select Committee on Intelligence
United States House of Representatives
Washington, DC 20530

Re. Views on the "Modernization of FISA" in the Wake of the NSA's Warrantless Surveillance Programs and the Reauthorization of the USA PATRIOT Act

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

CAROLINE FREDRICKSON
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

KENNETH B. CLARK
CHAIR, NATIONAL
ADVISORY COUNCIL

RICHARD ZACKS
TREASURER

Dear Congressman Hoekstra and Congresswoman Harman:

On behalf of the American Civil Liberties Union, and its hundreds of thousands of activists, members and fifty-three affiliates nationwide, we write to share our views about the hearing of the House Permanent Select Committee on Intelligence on the warrantless surveillance programs of the National Security Agency (NSA). We ask that this letter be submitted for the hearing record.

It is important to put this hearing in context, given last year's extensive debate about how the Patriot Act "modernized" the Foreign Intelligence Surveillance Act (FISA) and our strong concerns about the reduced civil liberties protections in the changes made by that law. We will also discuss the revelations of the NSA's warrantless wiretapping and illegal monitoring of Americans' private records, in addition to discussing the legislation that has been introduced to address these serious constitutional and statutory violations. Given the witness list, we also think it prudent to share with you our deep concerns about datamining. Finally, it is vitally important that this Committee, which was created as a result of the extensive bipartisan investigations of the Church Committee, remember the lessons learned from the history of unconstitutional surveillance of Americans and the severe risks such unchecked spying poses to the liberty our nation was founded to protect.

The Patriot Act Lesson. The topic of this hearing is the "Modernization of FISA." Yet, every member of this Committee knows well that "modernization" is precisely the rationale for the sweeping amendments to FISA made by the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (the USA Patriot Act). As former Bush official John Yoo told the public, "the primary provision in the Patriot Act makes amendments to the Foreign Intelligence Surveillance Act, which is the secret court you hear about that issues secret wiretaps and so on. What the Patriot Act did is that it modernized that statute. . . . We go to the federal courts for warrants and to

get the kind of wiretaps to fight terrorism." CNN, Apr. 27, 2005. President Bush made similar statements about the law that April:

> Now, by the way, any time you hear the United States Government talking about wiretap, it requires--a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think PATRIOT Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.

Eight months after these assurances that Americans' civil liberties were being protected it came to light that, in fact, the Bush Administration--on the advice of Mr. Yoo and other political appointees—had been monitoring Americans' phone conversations for the past nearly five years without any such check.

Warrantless Wiretapping. Rather than address the administration's failure to abide by what it then publicly acknowledged the Constitution "guarantees," some in Congress are poised to use the revelations of these violations as a springboard to authorize warrantless surveillance of Americans in the guise of "modernizing" the law. Yet, the law already allows the court to order wiretaps of the cell phones or other phones of Americans conspiring with al Qaeda—they can start immediately in case of an emergency with judicial review sought afterward, but the President has failed to comply with these exclusive, mandatory procedures. Between the Patriot Act in 2001, the Intelligence Authorization Acts of 2002 and 2004, and the reauthorization of the Patriot Act in 2005, at least a dozen substantive changes have been made to FISA in light of claims about modern technology, but the administration has failed to faithfully execute FISA's legal rules.

No additional amendments to the standards in U.S. foreign intelligence surveillance laws should be made without a clear and unequivocal commitment by the President to follow--to the letter--the bills passed by Congress and signed into the law. The first order of business must be to restore the rule of law.

This is especially imperative in light of the ongoing revelations of additional surveillance programs in violation of federal law. These revelations fly in the face of previous assurances that the NSA's surveillance of Americans' "communications" was "narrow" and did not include "domestic" calls between Americans. As a matter of law, FISA requires a court order before the conversations or communication records of people in the United States are targeted, regardless of whether the phone call is domestic or international. *See* 50 U.S.C. § 1801(f)(2) (providing statutory protections for targeted communications "to or from a person in the U.S."). The Committee should reject any assertion that these protections are inapplicable if every American is monitored and thus no one is "targeted" or, in other words, no one has any legal protection. Such claims turn FISA and its obvious intent inside out.

Unilateral Monitoring of Americans' Calls. Despite the administration's public assurances that its unilateral surveillance in the U.S. was purportedly focused on al Qaeda, in May, the public learned that AT&T has been allowing the NSA to access the domestic phone records of millions of Americans. While we still do not know the total number of customer records to which the NSA has been given access, it is clear that the company handles billions of phone calls and creates records on millions of Americans (for toll calls as well as for local and long distance calls on cell phones), records that federal law requires be kept private unless obtained with a court order. *See, e.g.*, 50 U.S.C. § 1842(d)(2)(A). If AT&T merges with BellSouth, the merged company would have "70 million local-line phone customers, 54.1 million wireless subscribers and nearly 10 million broadband subscribers." www.cbsnews.com/stories/2006/03/06/business/main1373874.shtml. The volume of data accessible by the NSA over the past nearly five years, without any independent judicial check, is obviously exponentially greater than the number of customers of the cooperating companies.

In response to these revelations, the President claimed the NSA is not "mining or trolling through the personal lives of millions of innocent Americans." CNN, May 11, 2006. The evidence tells a different story, and unfortunately, it seems that—with this, the first hearing of HPSCI on these critical constitutional issues—Congress is entertaining proposals to allow exactly that. The ACLU strongly opposes any legislation that would authorize the NSA's programs to monitor the conversations or calling records of people in the U.S. without individual court orders.

Two significant bills address the NSA's unchecked surveillance program have been referred to the Committee, and we would like to make sure the Members are aware of our views in favor of those thoughtful proposals. An additional bill from the Senate has received a great deal of attention despite its breathtaking failure to protect Americans' individual rights, and so we feel obliged to make our serious objections to that bill known to this Committee. That bill should also be notorious for its line-by-line deletion of FISA's procedural protections and its attempt to slip in an authorization for unchecked datamining, papering over Americans' longstanding objections to allowing the federal government to mine or troll through the personal lives of millions of innocent Americans.

The LISTEN Act. The ACLU endorses H.R. 5371, the "Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA Act," which reinforces the requirement that the president must follow FISA and the criminal wiretap rules as the "exclusive" procedures for wiretapping Americans in this country. This common sense legislation by the Ranking Member of this Committee and the Ranking Member of the House Judiciary Committee would also authorize additional funds for compliance with the law. And it would also help expedite judicial review of requests of wiretaps of agents of al Qaeda or anyone in the U.S. conspiring with such agents. A copy of that letter is attached, and we ask that it be included in the record.

The NSA Oversight Act. The ACLU also supports H.R. 4976, the "NSA Oversight Support Act," a strong bipartisan bill that underscores that FISA is

the mandatory procedure by which the Executive Branch can conduct electronic surveillance to gather foreign intelligence in the United States. This legislation, co-authored by Congressmen Flake and Schiff, also reinforces the legitimate and necessary role of Congress as a check on any president, by requiring additional and prompt reporting to Congress about all secret surveillance of Americans. A copy of that endorsement letter is also included for the record.

FISA has already been modernized, through at least a dozen substantive changes over the past nearly five years, and what is needed now is for Congress to insist that it be enforced. What should not be done is to allow "modernization" to be used as a euphemism for authorizing programs of surveillance against American residents without any independent oversight. One of the most important attributes of current law is that it "was designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604(I), at 7, 1978 USCCAN 3904, 3908. In spite of this important intent to protect Americans' Fourth Amendment freedoms, legislation was introduced just last week that would completely undermine these protections.

The National Security Surveillance Act. The Cheney-Specter bill, S. 2453, has not been introduced in the House, but it should be dismissed as utterly inconsistent with the purpose of FISA and the letter and spirit of the Fourth Amendment. The constitutional infirmities of this one-sided legislation are too numerous to detail in this letter, but suffice it to say that a law that makes judicial review optional, for this president and future ones, provides no protection at all.

At its heart, Cheney-Specter eliminates the fundamental requirement of FISA that the Executive Branch get a court order to target any American in the name of national security. It also concocts a scheme for the FISA court to approve a "program" of NSA surveillance without any evidence an American is conspiring with al Qaeda, contrary to the requirements of the Fourth Amendment. The threshold for this dragnet virtually ensures that journalists, lawyers, hotel clerks, and other absolutely innocent Americans will be subject to round-the-clock surveillance of their conversations, indefinitely. And Vice President Cheney also insisted that the law be changed to eliminate the requirement that the courts and Congress be told the names and number of Americans monitored under this sweeping spying program. A more comprehensive review of the flaws in this legislation will soon be circulated.

Data-mining. The administration's real position on datamining seems to be that the commander-in-chief can "lawfully" demand or order the disclosure of any private information about an American, whether it is protected by the Fourth Amendment's warrant requirement or federal statute. But, just because a person in the U.S. has shared private information with his or her doctor or bank or phone company does not mean that he or she has made a blanket waiver of privacy. Cheney-Specter grants this exemption without any hearings into the extensive and intrusive datamining that has been publicly disavowed by the President and how it damages our civil liberties.

Some of the witnesses the Chairman has called to testify advocate for allowing the data about millions of Americans to be routinely analyzed with computer programs by the NSA or Department Defense or other military agencies, without any independent check whatsoever. We strongly disagree with the claims of Judge Posner and others that "machine collection and processing of data cannot, as such, invade privacy" because the sifting "keeps most private data from being read by any intelligence officer." As the brilliant Justice Brandeis foresaw almost a century ago:

> Subtler and more far-reaching means of invading privacy have become available to the government . . . Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home . . . It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.

Olmstead v. U.S., 277 US 473, 474-75 (1928) (Brandeis, J., dissenting).

The issue is not whether a government agent versus a government computer acquires or analyzes data about innocent Americans. The issue is whether the government should have access to such information about millions of innocent people in the first place. The Cheney-Specter legislation, and other proposals like it, ignore that it is the person's right to privacy that cannot be violated by the government without cause by whatever instrumentality is developed. We cannot accept that our Fourth Amendment and statutory rights to privacy will simply be extinguished by human innovation.

The Lessons of the Church Committee. Computer programs and 21st century technology that allow military agencies to capture and analyze the data about the personal lives of anyone they choose are powerful and dangerous weapons that should be focused on appropriate targets, not trained on innocent Americans. Thirty years ago, Senator Frank Church warned that Congress must protect the American people from the NSA's potential technology that "could be turned around on the American people, and no American would have any privacy left. Such is the capacity to monitor everything: telephone conversations, telegrams, it doesn't matter." After hundreds of hours of investigations, Senator Church endorsed FISA, stating:

> I know the capacity that is there to make tyranny total in America, and we must see to it that [the NSA] and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.

There should be no doubt in anyone's mind that unilateral, unchecked spying on Americans--whether by agents or computers or agents operating

computers or software programs--threatens the very legacy of liberty our leaders have pledged to defend against any foe, foreign or domestic.

It is also plain from the public statements of Members of this Committee, as well as the votes on the Intelligence Authorization bill amendments earlier this year, that Members were not fully, promptly and properly informed by the administration about technical and tactical intelligence deployed without a court order against Americans in this country. The Committee must not allow this unilateralism to continue, and it must not reward deceit and subterfuge by authorizing the very programs that have violated the law.

We urge the Committee to conduct additional public hearings into these very important issues, and urge you to ensure that other Members of Congress have access to information about this administration's illegal monitoring of Americans' conversations as well as telephone calls and financial transactions among other private data. We also ask you to report favorably H.R. 5371 and H.R. 4976. We have not yet had an opportunity to consider Congresswoman Wilson's bill, but we will share our views on it with you.

Thank you for considering our views on modernization and the importance of reinforcing the rule of law that protects the liberty of all Americans.

Sincerely,

Caroline Fredrickson
Director, Washington Legislative Office

Lisa Graves
Senior Counsel for Legislative Strategy

Enclosure.

WASHINGTON
LEGISLATIVE OFFICE

June 30, 2006

The Honorable Adam Schiff
House Judiciary Committee
United States House of Representatives
Washington, DC 20530

Re: Support for H.R. 4976, the "NSA Oversight Act"

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005-2313
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

KENNETH B. CLARK
CHAIR, NATIONAL
ADVISORY COUNCIL

RICHARD ZACKS
TREASURER

Dear Congressman Schiff:

On behalf of the American Civil Liberties Union, and its hundreds of thousands of activists, members and fifty-three affiliates nationwide, we write to express our support for H.R. 4976, the "NSA Oversight Act."

H.R. 4976 reinforces the requirement that the president must follow the laws passed by Congress. The bill reaffirms what the Constitution and the plain language of the law require: that the government must get a court order before monitoring Americans' communications. That order must be based on a judicial finding that there is probable cause of either criminal activity or that the target of the wiretap is an agent of a foreign power or an American conspiring with a foreign power.

The bill also make clear the Congress meant what it said when it passed the Foreign Intelligence Surveillance Act (FISA) and provided that its provisions along with the provisions in the criminal code are the "exclusive" procedures for wiretapping Americans in this country. Indeed, Congress tried to put to rest the very claims President Bush is making today: "[E]ven if the president has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which surveillance may be conducted." H.R. Rep No. 95-1283, pt. 1 at 24 (1978). This is particularly critical because FISA "was designed...to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604(I), at 7, 1978 USCCAN 3904, 3908. This is the same justification being used to day.

H.R. 4976 would also make clear that the Authorization for the Use of Military Force (AUMF), Pub L. No. 107-40, does not authorize the illegal NSA spying programs that investigative reporters have uncovered. That resolution does not give the president a blank check to break any law he chooses. The AUMF says nothing about repealing protections for

Americans' civil liberties, and it does not amend or alter the legal requirement that the government get an order from the FISA court before monitoring the conversations and calling patterns of Americans.

The bill would also require the disclosure, by the President to the appropriate members and committees of Congress, of information identifying the U.S. Persons who have been subjected to warrantless surveillance, and indicating why they were selected for such surveillance. This disclosure requirement allows for congressional oversight of the program and is an important step in restoring checks and balances within our system.

For all these reasons, we are pleased to support this responsible legislation that reinforces the rule of law that protects the liberty of all Americans.

Sincerely,

Caroline Fredrickson
Director

Lisa Graves
Senior Counsel for Legislative Strategy

WASHINGTON
LEGISLATIVE OFFICE

May 17, 2006

The Honorable Jane Harman
Ranking Member
House Permanent Select
Committee on Intelligence
United States House of Representatives
Washington, DC 20530

Re. Support for H.R. 5371, the "Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA Act"

Dear Congresswoman Harman:

On behalf of the American Civil Liberties Union, and its hundreds of thousands of activists, members and fifty-three affiliates nationwide, we write to express our support for H.R. 5371, the "Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA Act."

H.R. 5371 reinforces the requirement that the president must follow the laws passed by Congress. The bill reaffirms what the Constitution and the plain language of the law require: that the government must get a court order before monitoring Americans' communications. That order must be based on a judicial finding that there is probable cause of either criminal activity or that the target of the wiretap is an agent of a foreign power or an American conspiring with a foreign power.

The bill also makes clear that Congress meant what it said when it passed the Foreign Intelligence Surveillance Act (FISA) and provided that its provisions along with the provisions in the criminal code are the "exclusive" procedures for wiretapping Americans in this country. Indeed, Congress tried to put to rest the very claims President Bush is making today: "[E]ven if the president has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted." H.R. Rep. No. 95-1283, pt. 1, at 24 (1978). This is particularly critical because FISA "was designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604(I), at 7, 1978 USCCAN 3904, 3908. This is the same justification being used today.

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

H.R. 5371 would also make clear that the Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, does not authorize the illegal NSA spying programs that investigative reporters have uncovered. That resolution does not give the president a blank check to break any law he chooses. The AUMF says nothing about repealing protections for Americans' civil liberties, and it does not amend or alter the legal requirement that the government get an order from the FISA court before monitoring the conversations and calling patterns of Americans.

The bill would also address the idea of increasing the speed of the FISA process by inviting the president to report to Congress about how to further streamline processing of information and expedite FISA review. It would also authorize additional appropriations to aid in FISA processing of requests for orders for surveillance. These changes underscore the legal requirement that there be a check on whether such surveillance is warranted, rebuffing the suggestion that the government can simply bypass this mandated review.

For all of these reasons, we are pleased to support this responsible legislation that reinforces the rule of law that protects the liberty of all Americans.

Sincerely,

Caroline Fredrickson,
Director, Washington Legislative Office

Lisa Graves,
Senior Counsel for Legislative Strategy